THE DYNAMIC MODEL OF THE JUDICIAL PROCESS AND THE RATIO DECIDENDI OF A CASE

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My aim in this article is to show that the concept of a binding *ratio decidendi* belongs to what I shall call the static model of the judicial process; that this model is inappropriate; that the appropriate model is what I shall call the dynamic model; and that the continued acceptance of the concept of a binding *ratio decidendi* in England is largely due to the failure to distinguish clearly between the two models. In good faith, no doubt, the difficulties created by the static model are evaded by sheltering behind the dynamic model. I shall not be concerned to set out or criticize any theory of *ratio decidendi* as such, for if I am right they are all misconceived. I shall only deal with such theories in so far as it is necessary to establish my own conclusions. Unavoidably, the bulk of the article will be devoted to clearing the ground, and it will not be possible in the space available to do more than indicate the bare bones of the dynamic model; the filling in must be left for another occasion.

I have claimed that the continued acceptance of the concept of a binding *ratio decidendi* in England is largely due to the failure to distinguish clearly between the static and the dynamic model of the judicial process. But there are two other factors which have helped to buttress this concept. The first is the support given to it in numerous judicial *dicta*. Here we are to some extent involved in a vicious circle, for the acceptance of the static model has tended to indentify the judicial process with authority rather than with reason, justice and social policy. It has resulted in an inverted pragmatism which clings to judicial pronouncements, however conflicting, ambiguous and unsatisfactory as the sole *terra firma* in legal analysis. There is no question of course that judicial pro-

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nouncements deserve most careful consideration. Nevertheless, they must be examined on their own merits, and not accepted as revelations beyond rational inquiry. Considering the speed of the judicial process it would indeed be astonishing if statements made by judges were never self-contradictory or absurd, or founded on false assumptions, or open to criticism on policy grounds, or simply unconvincing. It would be compounding these errors to take such statements seriously or to rationalise them, or to explain them away. Similarly, what is the nature of the judicial process is a philosophical question and not a question of law, yet all too often the observations of judges on this point are treated as authoritative. Although it is recognised that the common law was largely developed with the aid of fiction, there is still a naive belief that the judicial process must be taken at its face value.

The second factor which has helped to buttress the concept of a binding *ratio decidendi* is the ambiguity of that term. In the words of Professor J. L. Montrose:

> The terminology whereby "*ratio decidendi*" signifies the rule propounded by the judge should not be allowed to be used to beg the question whether such a rule is of binding authority. The terminology whereby *ratio decidendi* signifies the rule which is of binding authority should not be allowed, as Goodhart pointed out, to beg the question how the rule is determined. I prefer to use the phrase with the first meaning. The second usage is one of those mixed fact-law concepts which are convenient for describing the conclusions, but not the bases, of legal reasoning. It involves a concept to which nothing real may be related: and leads to the assumption that there is always a rule of law for which a case is of binding authority.[1]

A similar, though not an identical point is made by Professor J. Stone. He says:

> Should we not, in the first place, try scrupulously to respect the distinction between that use of the term *ratio decidendi* which describes the process of reasoning by which decision was reached (the "descriptive" *ratio decidendi*), and that which identifies and delimits *the* reasoning which a later court is bound to follow (the "prescriptive" or "binding" *ratio decidendi*)?[2]

It is important to distinguish clearly between the *rule* propounded by the judge and Professor Stone's "descriptive" *ratio* which describes the *process of reasoning* that culminates in the decision. The term *ratio decidendi* is more often than not used in a mixture of these two senses, which is sometimes confused and

[1] The Ratio Decidendi of a Case (1957), 20 Mod. L. Rev. 587, at pp. 588-589.

[2] The Ratio of the Ratio Decidendi (1959), 22 Mod. L. Rev. 597, at p. 600.

sometimes contrasted with *ratio decidendi* in the sense of the binding element of a case. In view of the ambiguity of the term *ratio decidendi*, I shall speak of the rule (or rules) expressly or impliedly laid down by the judge, his process of reasoning, and the binding *ratio* (or *rationes*) of a case.

The static model depicts the judicial process essentially as a process of classifying or subsuming new fact situations under existing rules. If the controlling rule is contained in a statute it will be binding. If it is contained in a precedent, then depending on the respective places in the hierarchy of the precedent court and of the later court, the controlling rule will either command obedience or merely set a standard of persuasive authority. The concept of a binding *ratio* is relevant only if the controlling rule demands obedience; it is based on what I shall call the sub-model of obedience. There may, of course, be more than one controlling rule.

The static model presupposes a legal system consisting of closed rules. But the nature of the judicial process, the ramifications of law, and the range of possible fact situations make for a system of open-textured rules.[3] The static model is inappropriate to such a system, for the ambit of open-textured rules and hence their content are indeterminate. Consequently, a given fact situation may or may not be covered by an existing rule, or it may be covered by two or more conflicting rules. Moreover, since the class of possible fact situations is not closed, none of the existing rules may be in point, or the judge may not wish to follow an existing rule where that rule is of persuasive authority only. In all these cases something more than classification is required from the judge; it is not for nothing that we speak of judicial *decisions*.

It follows from the above that the sub-model of obedience is inappropriate to a system of open-textured rules. A command cannot operate as a command if it is equivocal. An indeterminate rule is equivocal and therefore cannot command obedience. Admittedly, every rule is equivocal to some extent, but the normal ambiguity of language is very different from what is ordinarily meant by ambiguity and from the structural indeterminacy of open-textured rules. Commands cannot be evaded by semantic quibbling; they can, however, be challenged as commands on the ground that they do not define sufficiently the obligation imposed. For instance any verbal formulation of the binding *ratio* of *Dono-*

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[3] Thus Professor H. L. A. Hart speaks of the *defeasibility* of legal concepts. See the Ascription of Responsibility and Rights (1948-49), Proc. Aristot. Soc. N.S. 171, at p. 172 *et. seq.*

ghue v. *Stevenson*[4] can be challenged on this ground. It will not do to say that an open-textured rule can be obeyed if it covers the case, for by hypothesis we do not know precisely what cases the rule covers. Nor will it do to say that the core of a rule may be certain, even if the penumbra is not, and that the open texture of a rule does not prevent it from covering the stock situations. The rule is not confined to the stock situations, and if it were, it would no longer be the same rule: For instance to say that the rule in *Donoghue* v. *Stevenson* must be obeyed in the stock situations is to introduce a narrower rule which must be obeyed, and that rule will still be open-textured.

It is generally conceded that judges do not have the powers of legislators and that the rules laid down by them may be wider (or narrower) than the binding *ratio* of the case. The concept of material facts is normally used to circumscribe the rule expressly or impliedly laid down by the judge. But it also plays a more direct role in the static model of the judicial process. The process of classifying new fact situations under existing rules is often envisaged as a process of shrinking the facts of a case into its material facts and matching these with the material facts of a precedent case. At first sight the concept of material facts seems to offer a way out of the difficulties of limiting the scope of rules laid down by judges. Dr. A. L. Goodhart uses the concept in this way, and Professor D. P. Derham introduces an interesting refinement by focussing attention on the issues joined between the parties.[5]

In Dr. Goodhart's view the binding *ratio* of a case can be found "by determining (a) the facts treated by the judge as material and (b) his decision as based on them".[6] Dr. Goodhart recognizes the indeterminacy of material facts, but he seeks to define them by relying on the finding of the precedent court. However, as Professor Stone has demonstrated, the material facts of a case cannot be defined in that way if only because of the various levels of generality at which facts may be stated:

> If the *ratio* of a case is deemed to turn on the facts in relation to the holding and nine facts (a)—(j) are to be found in the report, there may (so far as logical possibilities are concerned) be as many rival *rationes decidendi* as there are possible combinations of distinguishable facts in it. What is more, each of these "facts" is usually itself capable of being stated at various levels of generality, . . .[7]

[4] [1932] A.C. 562 (H.L.).

[5] See *infra*.

[6] The Ratio Decidendi of a Case (1959), 22 Mod. L. Rev. 117, at p. 119.

[7] *Op. cit.*, footnote 2, at p. 603. The following background considerations should also be borne in mind: Facts are not hard particles which can be classified into "material" and "immaterial". Our way of looking at the

Even supposing the correct level of generality laid down by the precedent court could be ascertained, the binding *ratio* so found would only be binding for a later case whose facts are "on all fours" *in every respect.*

> And since the *italicised* words must be taken seriously, this reduces the range of binding *ratio decidendi* to vanishing point. Outside this range, the question always is whether in the later court's view the presence in the instant case of *some* of the facts (a)—(j), at some of their alternative levels of generalized statement, is more relevant to its present decision, than the absence of *the rest of them.* And this is not a question of the "materiality" of facts to the decision in the precedent case imposing itself on the later court. It is rather a question of the analogical relevance of the prior holding to the later case, requiring the later court to choose between possibilities presented by the precedent case.[8]

Professor Derham draws a distinction between the "bindingness" of decisions of particular questions of law which have to be answered *because* of the issues raised between the parties, and the "bindingness" of a general proposition of law which may be accepted as the *ratio decidendi* of a case. Thus, one question might be: "Do the Rent Restrictions Acts bind the Crown?" The question of precedent might be: "Does such and such a case, which deal with similar issues as the one before me, decided by a court whose decisions admittedly bind this court, hold that the Rent Restrictions Acts do not bind the Crown?"[9] Again, if it is decided or conceded that the Rent Restrictions Acts do not bind the Crown, the question might be: "Are territorial associations within the meaning of the Territorial and Reserve Forces Acts 1907,

world is conditioned by our interest, by our point of view, and this may vary not only in space and time, but according to the purpose in hand. The different kinds of maps in an atlas are good examples of purpose criteria of materiality. Even the statement of facts of a case is already a selection made by the reporter in the light of his purpose, and going back, the same of course is true of evidence given in court, accounts given to legal advisers, *etc.* Any description of a fact situation is influenced by a number of factors, including the purpose for which it is made. It does not follow from this that the words used in the description are necessarily significant. *E.g.* a person may be described alternatively as an old lady, or a widow, or a testatrix, or the mother of John Doe, without anything turning on the mode of description. Conversely, the mere fact that a person is not expressly described, *e.g.* as an adult, or a sane person, or without a criminal record, does not mean that these attributes are immaterial. The open texture of the level of generality at which fact situations may be described is merely an instance of the open texture of descriptions. Generalizations do not stand in any fixed hierarchical order. *E.g.* "any dead snails" may be narrower or wider than "any noxious matter", depending on the purpose of classification. Thus, if we are concerned with snails, an embargo on snails (noxious or not) is wider than an embargo on noxious matter.

[8] *Ibid.*, at pp. 604-605.

[9] See *London County Territorial and Auxiliary Forces Assn.* v. *Nichols and another*, [1949] 1 K.B. 35.

emanations from the Crown so as to be able to claim the immunity from the Rent Restrictions Acts enjoyed by the Crown?" The questions posed have been answered by the Court of Appeal. If these questions should arise later in an inferior court, the Court of Appeal's answers would be treated as settling them. Similarly, the House of Lords in *Best* v. *Samuel Fox & Co.*[10] held that a wife has no right to damages for loss of consortium against a person who negligently injures her husband. If the question whether a wife could sue for damages for loss of consortium were raised before another court, the answer would be: "The House of Lords has decided this question and this court is bound by the House of Lords' decisions". Another example given is the decision of the House of Lords in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*,[11] which decided that the National Anti-Vivisection Society was not "a body of persons established for charitable purposes only" within the meaning of section 37(1)(b) of the Income Tax Act 1918. Once again inferior courts would not look behind the House of Lords' answer to that precise question.

> Those cases have been chosen at random. An almost limitless list of cases could be cited to illustrate the point. Those cases involved "decisions" which can be seen to "bind." The specific question concerned has been answered by a superior court in the same hierarchy. Much of the law at rest as it were can be seen to be comprised by decisions of that kind.[12]

Professor Derham performs a valuable service in stressing that judges are concerned with the issues raised by the parties and do not lay down rules in a vacuum. On the other hand, he adds to the existing difficulties by introducing a new category of binding *ratio*[13]. It should be noted that decisions of particular questions are normative decisions, that is, they set standards, and take the form of rules. Such decisions may still be open to the charge of indeterminacy. This point is conceded by Professor Derham himself:

> "Complications and indeterminacies" are invited primarily because of the irremovable indeterminacy of particular facts when used alone as ground for the erection of a general rule. Even where the answer to a particular question is concerned, and not the general principle used to justify that answer, the question and answer may be of a kind which require the inclusion of a statement of facts in their expression. If so, the element of indeterminacy mentioned is likely to be important. Thus in the [hypothetical case given] the judicial answer to a precise

[10] [1952] A.C. 716.
[11] [1948] A.C. 31.
[12] Derham, Precedent and the Decision of Particular Questions (1963), 79 L.Q. Rev. 49, at p. 53.
[13] He does not, however, apply to it the term *ratio decidendi*.

> question may be that "the invasion of poplar tree roots can constitute a nuisance if they cause damage on neighbouring land". That question and that answer are of a very different kind from the judicial answer, for example, to a question about the validity of a by-law, which may be that the by-law is wholly invalid because made without power.[14]

It must not be assumed that a rule which does not contain an express statement of fact is automatically exempt from the charge of indeterminacy. A concept which is used in lieu of a statement of fact may be just as much open to this charge. For instance, the concepts of *Crown*, and *emanations from the Crown*, cannot be explained without referring to the numerous cases which mark out these concepts. Both the rule that the Crown is not bound by the Rent Restrictions Acts, and the rule that territorial associations are emanations from the Crown for the purpose of securing exemption from the Rent Restrictions Acts, are open-textured. For instance, they leave open the question whether the exemption applies to buildings leased as well as occupied by the associations (and what are its powers of leasing, and what is included by leasing, and so on), and whether an association may be estopped from setting up the exemption. These two issues were in fact raised in the case cited. Similarly, the ambit of the rule laid down in *Best* v. *Samuel Fox & Co.*[15] that a wife has no right to damages for loss of consortium, hinges on the indeterminate concept of consortium. This concept has to be marked off from enticement and servitium, which can only be done by describing the kinds of fact situations covered by these concepts. Admittedly, the rule that the Anti-Vivisection Society is not a body within section 37(1)(b) of the Income Tax Act 1918,[16] is not indeterminate in this way, nor is a rule that a certain by-law is invalid. It would be quibbling to describe such rules as open-textured. But although the sub-model of obedience is workable in these cases, the judicial process is rarely concerned with them. Only foolish or ill-advised parties will be rash enough to challenge what is in effect *res judicata*.

Professor Derham does not limit binding decisions to these exceptional cases. His aim is a good deal more ambitious. He maintains that once a particular issue has been decided by a higher court, and it is raised again before a lower court in substantially the same language, then the decision of the higher court must be obeyed by the lower court. This is so whether or not it contains a statement of fact, either express or implied, and whether it is open-textured or not. The plausibility of Professor Derham's

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[14] *Ibid.*, at p. 61. [15] *Supra*, footnote 10. [16] *Supra*, footnote 11.

claim rests on an ambiguity. It is arguable that there is a secondary rule of procedure to the effect that if an issue has been decided by a higher court, and it is raised again in a lower court in substantially the same language, then the lower court must decide the issue in the same way as the higher court, and that *that secondary rule* commands obedience. This proposition is very different from the proposition that the rule *laid down by the higher court* must be obeyed by the lower court, even where the rule is open-textured. The first proposition is arguable, since the rule in question (the secondary rule) is not open-textured. But it places Professor Derham on the horns of a dilemma. If he does not accept any limitation on the "bindingness" of decisions of particular questions as long as the issue was put before the judge, the parties could sidetrack the judge by raising all sorts of extraneous issues and his decisions of such issues would nevertheless be binding. If, on the other hand, Professor Derham limits the "bindingness" of decisions to the material facts of the case, then he would be faced with the classic difficulty of defining these facts. The criterion of "necessary to a course of reasoning adopted by the court in order to decide an issue which was before it", which Professor Derham seems to use generally to circumscribe rules laid down by judges,[17] does not restrict the issues *put* before a judge. Nor does it, as "necessary" might tend to suggest, restrict a line of reasoning to a minimum number of steps. Such a limitation would not be practicable. "Necessary" merely excludes anything clearly irrelevant and with this Professor Derham I think would agree. Consequently, judges could lay down very wide rules, provided that they took care to legislate only with reference to the issues raised by the parties. On the other hand, the fruit of their legislation would be sparse, for counsel briefed in later cases would obviously take care to formulate the issues in a somewhat different way in order to avoid a head on collision with a rule laid down by a precedent court.

The following points should also be taken into account in assessing Professor Derham's theory: First, the terms "issue", "question", "answer", "decision" give a misleading impression of simplicity. More often than not the arguments of counsel, which usually are the only means of defining the legal issues, do not meet precisely, and the decision of the judge does not always define *the* issues. Secondly, legal issues have a way of getting entangled with factual issues, and this adds to the indeterminacy of "issue". Third-

[17] *Op. cit.*, footnote 12, p. 60.

ly, Professor Derham does not attempt to deal with the traditional concept of a binding *ratio* and therefore the relation between binding decisions of particular questions and that concept remains obscure. It may well be asked, for instance, what the two have in common, or what they do not have in common.

Both Dr. R. Cross and Mr. A. W. B. Simpson build on the rule expressly or impliedly laid down by the judge. Dr. Cross describes the *ratio decidendi* of a case as "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury".[18] He admits, however, that in arriving at the *ratio*, regard must be had to the facts of the case, the issues raised by the pleadings and the arguments, and the previous state of the law, and that observations of members of the court in prior and subsequent cases may afford guidance. Dr. Cross finally admits that the *ratio decidendi* of a case may vary with subsequent judicial interpretations:

> The *ratio decidendi* of a case is generally the proposition of law for which that case may be cited as authority, but it is the practice of the judges to interpret a decision in the light of the facts of the case and the decisions in other cases. Accordingly, in order to ascertain the proposition of law for which a case is authority at a later date, regard must be had to subsequent cases in which it has been considered.[19]

To admit that the binding *ratio* of a case may vary with subsequent judicial interpretations is to admit that cases do not have a binding *ratio*. Nevertheless, Dr. Cross goes out of his way to justify the running together of binding *ratio* and the rule laid down by the judge on the curious ground that there is no distinction between these two senses of *ratio decidendi* until a decision has been interpreted in a subsequent case, and that very often there will continue to be no such distinction.[20] The criterion of "necessary" which Dr. Cross uses to circumscribe the rule laid down by the judge merely excludes as we have seen anything clearly irrelevant.

Mr. Simpson recognizes the logical difficulties which arise from the use of the criterion "necessary for the decision".[21] He suggests the following limitations:

> Limitations upon a rule-making power may be formal or substantial; they may restrict the way in which rules are made, and they may restrict what rules are made. The power vested in the judges is subject

[18] Precedent in English Law (1961), p. 75.
[19] *Ibid.*, p. 76.
[20] *Ibid.*, p. 77.
[21] The Ratio Decidendi of a Case and the Doctrine of Binding Precedent, Oxford Essays in Jurisprudence (1961), 148, at p. 163.

> to both kinds of limitation, but the concept of the *ratio decidendi* seems to embody only a formal limitation. This is that only a rule (or rules) *acted upon in court* can rank as a binding rule. Once this primary condition is satisfied the rule will so rank, *unless* one of the various exceptions to the doctrine of precedent apply—for example the *per incuriam* rule. The rule becomes binding, subject to exceptions. The fact that the rule has been acted on is the hallmark of relevance. . . .[22]

According to Mr. Simpson, the minimum required before a judge may be said to act upon a legal rule is (a) that he should have a rule in mind, though not necessarily a precise formulation of the rule, before he decides to act; (b) that he should decide that the rule is applicable, that is to say he should decide that some fact or facts should be subsumed under the rule, and this will involve a task of classification; (c) that he should deliberately so conduct himself that his conduct conforms to the conduct prescribed by the rule.[23] Mr. Simpson's conception of *ratio decidendi* would not appear to identify the binding *ratio* with the rule expressly or impliedly laid down by the judge. The "acting upon the rule" does not in any way limit the width of the rule laid down by the judge, provided it is consistent with his decision, which will normally be the case. Mr. Simpson admits that: "the relevant rule is just that rule which was acted upon, be it wide or narrow in scope, although a narrower rule would have justified the same action."[24] It is at this point that he brings in his distinction between formal and substantial limitations:

> When we have decided what the *ratio* of a case is, we still have to decide whether the case was rightly or wrongly decided, or decided for the wrong reason; for example the rule acted upon may contravene statute, or be at variance with the rule which can be extracted from the binding decision of a higher court. It is the exceptions to the doctrine of binding precedent and the system of appeals which impose restrictions upon the content of the rules upon which the courts can confer binding authority; the *ratio* of a case is only binding if it is not inconsistent with statute, or inconsistent with the *ratio* of another decision.[25]

Mr. Simpson maintains that these restrictions of a substantial nature are not embodied in the conception of the *ratio decidendi* of a case.[26] But if the judge has to go behind the rule on which the precedent court has acted in order to decide whether it is binding on him, then the sub-model of obedience is inappropriate, for a rule which may vary with subsequent interpretations cannot command obedience.[27] Further, having made his bow to the concept of a binding *ratio*, Mr. Simpson himself demonstrates it to be a

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[22] *Ibid.*, p. 161. [23] *Ibid.*, p. 162. [24] *Ibid.*, p. 164.
[25] *Ibid.*, p. 167. [26] *Ibid.*, p. 167. [27] See *supra.*

fiction. Thus he agrees with Dr. E. H. Levi that "the finding of similarity or difference is the key step in the legal process".[28]

> When an earlier case is followed the judge subsumes the situation which confronts him under the rule upon which the judge acted in the earlier case; he does not perform a merely passive role; it is he and not the earlier judge who makes the decision.[29]

How far the sub-model of obedience has been left behind can be seen by what Mr. Simpson has to say about "distinguishing" and "being bound":

> The introduction of exceptions and qualifications to rules of law by distinguishing is often treated as if it showed that courts are not *really* bound by earlier decisions, or that the courts use the doctrine of precedent as an almost fraudulent device for cloaking the fact that they do very much as they please in deciding cases. To some extent this notion arises from a failure to appreciate what is meant by saying that a court is bound by earlier decisions. To some extent it arises from giving the word 'bound' a too literal meaning, and imagining that being bound by case law involves some sort of psychological compulsion which removes the need for decision or the possibility of choice, in the way in which being bound by cords involves a physical compulsion.[30]

Yet, although there are numerous other passages which cannot be reconciled with the concept of a binding *ratio*, Mr. Simpson purports to remain loyal to that concept and seeks to put the blame for the present impasse on the confusion between the simple problem of defining and the more difficult problem of determining the *ratio decidendi*. He states that the *reductio ad absurdum* of this confusion is to be found expressed in the theory that the *ratio decidendi* of a case is a rule which is constructed by a later court when called to examine the case. According to Mr. Simpson, the following oddities would follow from this theory: (1) it would be a contradiction to say that a court had misunderstood an earlier case's *ratio*; (2) confronted with two variant constructions of the *ratio* of an earlier case, one would have to say that the case had two different *rationes decidendi*; (3) the *ratio* of a present case would be a prophecy of how the courts would construe it in the future; and (4) there would be no such thing as the *ratio* of a single case.[31] None of these criticisms are convincing if we keep in mind the distinction between two different senses of *ratio decidendi*, namely, the binding element of a case and the rule laid down by the judge.[32] The denial of the binding force of a *ratio*, does not prevent us from saying that a later court has misunderstood a rule laid down by

[28] An Introduction to Legal Reasoning (1955), p. 2.
[29] Simpson, *op. cit.*, footnote 21, p. 172.
[30] *Ibid.*, pp. 173-174. [31] *Ibid.*, p. 169. [32] See *supra*.

a precedent court. Similarly, there is no reason why there cannot be more than one construction of a rule laid down by a precedent court. The rule itself is not a matter of prediction, but the construction of the rule is. Again, the denial of binding force to rules laid down in single cases does not mean that such rules may not be laid down.

Similarly, Dr. Cross combines his loyalty to the concept of a binding *ratio* with a belief in "reasoning by analogy". Thus at the very beginning of his book he says:

> The rule of *stare decisis* causes the judges to reason by analogy because the principle that like cases must be decided alike involves the analogical extension of the decision in an earlier case.[33]

Later on Dr. Cross adopts the three step process stated by Dr. Levi with certain reservations:

> For Levi, the crucial stages are the first and second. According to him the judge perceives resemblances between the instant and a past case and proceeds to formulate a rule to govern both of them. He is not bound by the *ratio decidendi* of the past case, and the third stage is unimportant because it consists in the application of a rule which has already been formulated with reference to the instant case. Levi does not recognize that there may be situations in which the judge has no choice but to apply the *ratio decidendi* of a past case, or where he is obliged to do so unless he can point to a reasonable ground for holding that it does not apply. Reasoning by analogy would thus appear to play a more significant role in the American judicial process than it does in our own.[34]

This compromise solution is based on two unfounded assumptions: first, that the concept of a binding *ratio* is something more than a fiction; and secondly, that it is possible to distinguish between fact situations which fall under the sub-model of obedience and those which do not.

Dr. Levi breaks with the static model of the judicial process and the sub-model of obedience. However, he continues to describe the judicial process in terms of classification under rules, though he takes care to qualify the classification as moving and the rules as constructed. According to him, the basic pattern of legal reasoning is reasoning by example or analogy, that is, reasoning from case to case:

> It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the

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[33] *Op. cit.*, footnote 18, p. 19. [34] *Ibid.*, p. 207, n. 1.

> first is announced; then the rule of law is made applicable to the second case.[35]

The finding of similarity or difference, which is the key step in the process, is made by the judge in each case. Where case law is considered, and there is no statute, he is not bound by rules of law and the finding of material facts enunciated by precedent courts. The legal process is not the application of known rules to new facts. Nevertheless, it is a system of rules. The rules are discovered in the process of determining similarity or difference. Dr. Levi then poses the crucial question of how this determination is to be made:

> A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in common brings into play the general rule. If this is really reasoning, then by common standards, thought of in terms of closed systems, it is imperfect unless some overall rule has announced that this common and ascertainable similarity is decisive. But no such fixed prior rule exists. It could be suggested that reasoning is not involved at all; that is, that no new insight is arrived at through a comparison of cases. But reasoning appears to be involved; the conclusion is arrived at through a process and was not immediately apparent. It seems better to say that there was reasoning, but it is imperfect.[36]

This statement throws doubt on the significance of the first step of Dr. Levi's three step process. It correctly implies that the picking out of factual similarities between cases cannot be decisive in the absence of an overall rule which makes these similarities decisive. There are innumerable factual similarities and differences between cases, each of which may be decisive. Dr. Levi's second and third step are really one, for the whole point of constructing a rule out of the precedent case is to apply it to the instant case. While it is true that judges do sometimes justify their decisions by reference to rules which embrace both the instant and the precedent case, this is by no means standard practice. Moreover, the use of the term "rule" here is at best ambiguous.

Every rule is a norm, that is, it sets standards of what *ought* to be;[37] but not every rule is authoritative in the sense of being a repository of law. Statutes are authoritative rules in this sense. Rules laid down by judges, on the other hand, are not. Further, such rules may be expressly formulated, or may be merely laid

[35] *Op. cit.*, footnote 28, pp. 1-2. [36] *Ibid.*, p. 3.

[37] A principle is sometimes distinguished from a rule on the ground that the former is on a higher plane of generality. *Cf.* Co. Litt. 11. a. A more salient point of distinction, however, is the normative character of rules. Principles imply a degree of generality, but they need not be normative.

down by implication or imputed by a later court to a precedent court. Dr. Levi's constructed rules are of the last type. Both authoritative and non-authoritative rules are open-textured; for statutes like the common law are subject to the indeterminacy of legal rules.[38] However, while in the case of statutes their verbal formulation must be taken into account by the judge and his decision must purport to be consistent with it, the verbal formulations of rules laid down by judges may be ignored. These different facets of the concept of rule tend to breed confusion. Thus Dr. Levi deems it necessary to seek refuge in a paradox: law is *both* certain, unchanging and composed of rules, and uncertain, changing and only a technique for deciding specific cases.[39] Although he in fact demonstrates that it is the development of *concepts* which gives the common law its forward thrust, he does not distinguish clearly between rules and the concepts expressed in them. In consequence, he attaches perhaps too much importance to the verbal formulation of concepts and too little to their own momentum once they have entered the law.

It is suggested that the following version of the dynamic model of the judicial process is more appropriate: The function of judges is to decide disputes between parties in a normative fashion, that is, by the setting of standards. The factual issues (and some legal issues) are formalised in the pleadings, and the legal issues are generally stated in the form of arguments by counsel for or against the granting of certain remedies by the judge. The factual issues are decided by the judge (or jury) on the evidence; the legal issues are normally decided by the judge on the basis of the arguments presented, and where no arguments are presented or they are inadequate, between what the judge considers to be the competing arguments. In order to prepare an argument counsel must intuit or decide what legal concepts, or aspects of concepts and what authorities (including statutory provisions) may be claimed to be relevant. The argument itself is constructed by using the authorities in such a way as to build up the strongest possible case for the client. The factors which influence a judge to accept one argument rather than another cannot be reduced to a simple formula. Their range as well as their weight is elastic and may vary from judge to judge, from case to case, and from time to time. This does not mean that a judge is free to make decisions arbitrarily or as *he* thinks fit. He must act in accordance with the obligations of a judge. Thus, under the doctrine of precedent, he must decide

[38] See *supra*.

[39] *Op. cit.*, footnote 28, p. 4.

between the competing arguments with reference to the authorities on which they are based, making due allowance for the hierarchical positions of the courts concerned. In other words, he must decide between the alternatives of following, distinguishing and (where he has this power) overruling the authorities relied on. It is misleading to contrast the technical pull of legal concepts through precedents with the claims of justice, policy, interest, and so on, through the merits of the case. Legal concepts are not self-contained dogmas. They represent clusters of ideas which enter the law in the course of evaluating the merits of individual cases, and which set standards for future evaluations. Legal concepts like the rules in which they are expressed are open-textured, and they are for ever expanding, contracting and reforming under the pressure of the merits of new cases. The blight of conceptualism lies in its failure to grasp these facts. It thrives on the false assumption that legal concepts are composed of bundles of rules with fixed linguistic boundaries. In this state of affairs there often appears to be a conflict between the controlling legal concepts and the merits of the case. A good judge will prefer the argument which gives him not so much a loophole, as a means of restoring the flexibility of a concept, or of realizing its functional potential, even though the competing argument has the greater dogmatic appeal. Nor will he hesitate if the merits of the case demand it, to transmute or reconstitute an outworn concept, or to develop a rival concept, unless the dead weight of authority is too great. Perhaps the finest skill of counsel consists in blazing new conceptual trails which a judge may take without losing his foothold. In any event, a good judge will always be more concerned with the processes of reasoning of his predecessors than with their verbal formulations, and with reasoning in depth rather than with dogmatic reasoning. Far too often law is still treated as if it were a closed metaphysical system. Yet it should be obvious that law is functional, and that if it ceased to fulfil its functions, it would also sooner or later cease to be law.

Conclusion

The concept of a binding *ratio decidendi* belongs to what I have called the static model of the judicial process, and is based on the sub-model of obedience. The static model presupposes a legal system consisting of closed rules. But the nature of the judicial process, the ramifications of law, and the range of possible fact situations make for a system of open-textured rules. The static model is inappropriate to such a system, for the ambit of open-

textured rules and hence their content are indeterminate. Consequently, a given fact situation may or may not be covered by an existing rule, or it may be covered by two or more conflicting rules. Moreover, since the class of possible fact situations is not closed, none of the existing rules may be in point, or the judge may not wish to follow an existing rule where that rule is of persuasive authority only. The sub-model of obedience is inappropriate to a system of open-textured rules because a rule which is indeterminate is equivocal and therefore cannot command obedience.The attempts to reconcile the sub-model of obedience with the dynamic model are doomed to failure on two other grounds: they presuppose that the concept of a binding *ratio* is something more than a fiction; and they presuppose that it is possible to distinguish between fact situations which fall under the sub-model of obedience and those which do not. Neither of these presuppositions is true. It does not follow from the above that judges may ignore precedents. Properly understood, the doctrine of precedent is quite consistent with the dynamic model of the judicial process.